

additional instructions submitted by Mr. McGregor or by any other defendant in this case.

Senator Ross further requests the jury be instructed as follows:

ADDITIONAL PROPOSED INSTRUCTIONS

A. Ross Theory of Defense: Summary

The charges against Senator Ross all arise out of his actions in allegedly seeking or accepting or agreeing to accept contributions to his 2010 Alabama Senate re-election campaign. The Government does not accuse Senator Ross of soliciting or accepting or agreeing to accept any “thing of value” other than campaign contributions. And, there is no evidence that Senator Ross solicited or accepted or agreed to accept any “thing of value” other than campaign contributions.

Senator Ross contends that all his actions in allegedly soliciting or accepting or agreeing to accept campaign contributions 1) were lawful; 2) were consistent with accepted common practices in campaign fundraising in Alabama and under Alabama law; and, indeed, 3) are constitutionally protected activities protected by the First Amendment to the United States Constitution.

Even if you find or believe that any of Senator Ross’ actions violated or otherwise did not agree with accepted common practices in campaign fundraising in Alabama, you may not consider such evidence as evidence that he violated the criminal laws charged in this case, and such evidence does not constitute evidence of any crime charged in this case, unless you find that Senator Ross entered into an explicit agreement involving a *quid pro quo*, that is,

that he explicitly promised or undertook to vote for Senate Bill 380 in return for a specific contribution or contributions.

GRANTED _____ MODIFIED _____ REFUSED _____

B. Ross Theory of Defense: Specific Instructions

In this connection [i.e., in connection with Senator Ross' theory of defense], you are specifically instructed as follows:

1. It is not a crime for an elected official or candidate for public office in Alabama to seek and accept campaign contributions from persons, corporations, organizations, political action committees (PACs), or others, so long as the amount contributed does not exceed the maximum amount allowed by Alabama law. There is no contention and no evidence that Senator Ross sought or accepted any amount from any contributor or potential contributor that exceeded the maximum allowed by Alabama law. The fact that Senator Ross requested or accepted an amount in campaign contributions that you may consider to be excessive or large must not play any part in your decision on the charges against him.

GRANTED _____ MODIFIED _____ REFUSED _____

2. It is not a crime to request and accept campaign contributions within a year before either a primary or general election. [Code of Ala. §17-5-7(b)(2).²]

² To the extent that no authority is cited to support a given proposed instruction, all such instructions are at least common-sense corollaries to the principles in the cited

GRANTED _____ MODIFIED _____ REFUSED _____

3. It is not a crime to request and accept campaign contributions during an Alabama legislative session in an election year such as 2010, within 120 days of any primary, runoff, or general election. [Id.] There is no contention and there is no evidence that Senator Ross solicited or accepted campaign contributions other than during periods in which Alabama law permitted him to do so.

GRANTED _____ MODIFIED _____ REFUSED _____

4. It is not a crime or evidence of a crime to solicit and accept campaign contributions even if the elected official or candidate has no announced opponent or no opponent ever qualifies to run against the official or candidate. [See, e.g., Code of Alabama §17-5-8(a)(1) (Fair Campaign Practices Act; reporting requirements apply to candidates running unopposed); cf. *Roper v. Rhodes*, 988 So.2d 471, 481 n. 11 (Ala.2008) (Bolin, J., concurring specially) (noting that unopposed candidate's name must appear on general election ballot and stand for election, "because a write-in candidate could conceivably win the election by receiving more votes than did a party nominee or independent candidate whose name appears on the ballot.").]

GRANTED _____ MODIFIED _____ REFUSED _____

authorities, especially *McCormick v. United States*, 500 U.S. 257(1991), and *United States v. Siegelman*, 640 F.3d 1159 (11th Cir. 2011).

5. It is not a crime to solicit and accept campaign contributions under Alabama law from a person, corporation, organization, political action committee, or other entity. [See Code of Alabama §§17-5-2(a)(8) (definition of “person”), 17-5-8.]

GRANTED _____ MODIFIED _____ REFUSED _____

6. It is not a crime or evidence of a crime to solicit and accept campaign contributions from a person who, or a business or other entity that, is a constituent of the elected official or candidate. [See *McCormick*, 500 U.S. at 272.]

GRANTED _____ MODIFIED _____ REFUSED _____

7. It is not a crime or evidence of a crime for an elected legislator or candidate for the legislature in Alabama to solicit and accept campaign contributions from a person, corporation, organization, PAC, or other entity that has or may have business before the Legislature. [See *id.*]

GRANTED _____ MODIFIED _____ REFUSED _____

8. It is not a crime or evidence of a crime for an elected legislator or candidate for the legislature in Alabama to solicit and accept campaign contributions during a legislative session from a person or business or other entity whose interests may benefit from a vote or other official action taken (or to be taken) by the elected official during that session. [See *id.*]

GRANTED _____ MODIFIED _____ REFUSED _____

9. Legitimate campaign contributions often involve the contribution or giver expecting some benefit in return for the contribution. [*United States v. Davis*, 967 F.2d 516, 521 (11th Cir. 1992).]

GRANTED _____ MODIFIED _____ REFUSED _____

10. It is not a crime or evidence of a crime for an elected legislator or candidate for the legislature in Alabama to solicit and accept campaign contributions during a legislative session from a person or business or other entity whose interests may benefit from a vote or other official action taken (or to be taken) by the elected official during that session. [See *McCormick*, 500 U.S. at 272.] This is true even as to contributions solicited and accepted either shortly before or shortly after that official votes or takes other official action that benefits the contributor. [See *id.*] Stated differently, it is not a crime for an elected official to cast a vote or take other official action that may benefit a contributor, even shortly before or shortly after that official solicits and accepts a contribution from the contributor. [*Id.*]

GRANTED _____ MODIFIED _____ REFUSED _____

11. It is not a crime to demand a campaign contribution. A campaign contribution violates the laws charged in this case **only if** the contribution is induced by the use of force, violence, or fear, **or if** the contribution involves an explicit *quid pro quo*, that is, a specific contribution is made in return for an

explicit promise or undertaking by the official or candidate to perform or not perform a specific official act. [*McCormick*, 500 U.S. at 273; see *United States v. Siegelman*, 640 F.3d 1159, 1170 (11th Cir. 2011) (“*Siegelman II*”]. There is no contention or evidence in this case that Senator Ross obtained or tried to obtain any contribution by the use of force, violence, or fear.

GRANTED _____ MODIFIED _____ REFUSED _____

12. Accordingly, it is not a crime to solicit campaign contributions aggressively. The fact that you may find or believe Senator Ross was rude, persistent, and/or demanding in soliciting certain campaign contributions does not amount to, and is not evidence of, an explicit *quid pro quo*.

GRANTED _____ MODIFIED _____ REFUSED _____

13. It is not a crime or evidence of a crime to solicit a campaign contribution and to discuss pending legislation that would or may benefit the contributor in the same conversation or communication, or to address both close in time to each other. An elected official or candidate violates the law in soliciting or accepting a campaign contribution **only if** he or she explicitly promises or undertakes to perform or not perform a specific official act in return for a specific contribution. [*See McCormick; Siegelman II.*]

GRANTED _____ MODIFIED _____ REFUSED _____

14. It is not a crime or evidence of a crime to solicit a campaign contribution and to discuss a specific future official act that would or may benefit the contributor in the same conversation or communication, or to address both close in time to each other. An elected official or candidate violates the law in soliciting or accepting a campaign contribution **only if** he or she explicitly promises or agrees or undertakes to perform or not perform a specific official in return for a specific contribution. That promise or agreement or undertaking to perform or not to perform a specific official act in return for a specific contribution must be **explicit**. That is, for a promise or agreement or undertaking to be explicit, the existence of the promise or agreement or undertaking cannot simply be implied from the surrounding acts and circumstances, but instead must be shown by direct evidence. [Note: The applicability of the *McCormick* standard for an explicit promise or undertaking, as one that must be express and may not be implied from the surrounding acts and circumstances (as opposed to the *Siegelman II* finding that explicit does not mean express, but rather may be implied from the surrounding acts and circumstances), is discussed in detail in Senator Ross' motion for judgment of acquittal (doc. 1548), at 26-27; and in Senator Ross' Supplemental Brief Regarding Impact of *Siegelman* Decision (doc. 1103), at 11-15. We adopt and incorporate that discussion by reference here.]

GRANTED _____ MODIFIED _____ REFUSED _____

15. It is not a crime for an elected official or candidate, in soliciting a campaign contribution, to seek to persuade or convince a contributor to make a

contribution by discussing a) the official's views on issues; b) what the official has done in the past (including, for example, the official's sponsorship of particular legislation, or how the official voted on particular legislation); and/or c) what the official intends to do in the future; and to urge the contributor to make a contribution on any of those bases. [*McCormick*, 500 U.S. at 272.]

GRANTED _____ MODIFIED _____ REFUSED _____

16. An offer to contact other persons to request that such persons make a campaign contribution to the elected official or candidate does not constitute a specific contribution or a specific promise to make a contribution, as would be required to make out an explicit *quid pro quo*.

GRANTED _____ MODIFIED _____ REFUSED _____

17. An offer to make a campaign contribution in an unspecified amount at an undefined future time does not constitute a specific contribution or a specific promise to make a contribution, as would be required to make out an explicit *quid pro quo*.

GRANTED _____ MODIFIED _____ REFUSED _____

18. A campaign contribution to Senator Ross' re-election campaign is not considered a personal benefit to Senator Ross. The Government does not contend, and there is no evidence, that Senator Ross received a personal benefit

from any contribution to his campaign, or that Senator Ross was personally enriched by any such contribution to his campaign.

GRANTED _____ MODIFIED _____ REFUSED _____

As to any proposed instruction that is a common-sense application of *McCormick* but disputed by the Government as an accurate statement of *quid pro quo* doctrine as applied to attempts to criminalize campaign contributions, Senator Ross submits that 1) the Due Process principles of clear statement and fair notice, 2) the broad First Amendment protection afforded to core political activities of contributors and legislators, 3) the rule of lenity applicable to the construction of uncertain criminal enactments, and 4) the absence of clearly established law prohibiting such conduct at a fact-specific level, among other authority, all require resolving any doubts whether particular campaign fundraising activity can be criminalized, in favor of Senator Ross and the other defendants in this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of July, 2011, I have filed the foregoing with the Clerk of the Court electronically using the CM/ECF system, which will send notification to the following:

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